

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



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**SECRETARY, BOARD OF
OIL, GAS & MINING**

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April 12, 2010

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Re: Recusal Request in SUWA v Division, Docket 2009-019, Cause C/025/0005

Counsel:

The Division has reviewed the letter dated April 2, 2010 clarifying the statements by Jean Semborski at the March 24, 2010 Board hearing. We are also in receipt of the subsequent letter of April 9, 2010 from the Morris Law Office on behalf of the Petitioners stating their opinion that as a result of this clarification that Ms. Semborski must recuse herself. The Division disagrees with this conclusion.

The Division refers the Board to the Division's Response to the Petitioners' Request for Certification previously filed March 22, 2010 in this matter. As stated in that memorandum, recusal is not required in every case where a board member has a direct or indirect interest in a coal mining company in the state. The plain reading of the regulation requires recusal "from proceedings *which may affect* their direct or indirect financial interests." Utah Admin. Code R645-101-130 (emphasis supplied). This language does not establish a bright line test, such as direct or indirect ownership, but requires further examination.

A rule requiring recusal in every instance because of an indirect or direct interest in a coal mining company could have been easily stated. The actual language of the rule is more flexible, in part to allow participation by board members with an financial interest in coal mining in some proceedings, especially in states like Utah where board members are required to be chosen based on prior or current experience in coal mining.

The preamble to the federal regulations (which are essentially the same as the state regulations in relevant part) directly address this question and set forth the Office of Surface Mining's (OSM's) explanation of the purpose and intent of this language. See 51 Fed. Reg. 37119. It provides at least two examples where a board member would not need to recuse himself or herself although owning an indirect or direct interest in a coal mine in the state. These include a case where the proceedings will involve a coal company when there is no direct head-to-head competitive effect on the company owned by the board member; and the case where there is not a possibility of a precedent being established that would affect the owned company. Both of these examples make it clear that the board member must not only have an indirect or direct interest in a coal company in the state, but must also determine that the proceedings may affect those interests. *If the proceedings may not affect those interests, there is no reason for recusal.*

In this case, a relatively small open pit mine is proposed by an out of state company. There is no direct head-to-head competition. There is no apparent reason to presume that the decision to uphold or to deny the permit will affect the indirect interest of a board member whose spouse is employed by an unrelated coal mining company. The board member has certified that she has no direct or indirect interest in Alton Coal Development. This is the only surface mine in the state and so it is unlikely that any precedent will be established that would affect the other mining company. The board member may decide differently, but there is no requirement that the board member recuse herself based solely on the indirect interests as a result of her spouse's employment by a coal company.

The Division asks that the Board, without participation by Ms. Semborski, make a finding as to the correct legal standard applicable to a board member with an indirect ownership in a company that conducts coal mining operations within the state, and make it clear that where there is not a direct head-to-head competitive effect of the decision on the board member's indirect interests, or a precedent effect, or other reasons that may affect the board member's interests that recusal is not required. Then with this board

finding as clarification, Ms. Semborski can determine if the facts as she knows them regarding her indirect interest and the issues raised in this matter require her recusal.

If further briefing is desired, the Division will do its best to provide an expedited response.

Yours truly,

A handwritten signature in cursive script that reads "Steve".

Steve Alder
Assistant Attorney General